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No. 93-2068

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In the Supreme Court of the United States

OCTOBER TERM, 1994

BRETT C. KIMBERLIN, PETITIONER

v.

J. MICHAEL QUINLAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTIONS PRESENTED

1. Whether, in a *Bivens* case in which unlawful motive is an element of a constitutional claim, a plaintiff must meet a "heightened pleading" standard to survive a motion to dismiss or for summary judgment raising a qualified-immunity defense.

2. Whether a plaintiff in a *Bivens* action in which unlawful motive is an element of a constitutional claim must produce, prior to discovery, "direct" as opposed to circumstantial evidence of unlawful motive in order to avoid dismissal or summary judgment.

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INTEREST OF THE UNITED STATES

The United States has important interests in the law relating to qualified immunity, including the standards at issue in this case. Qualified immunity applies in civil actions against federal personnel in their personal capacities under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), as well as in civil actions against state and local officials under 42 U.S.C. 1983. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982); *Butz* v. *Economou*, 438 U.S. 478, 500-

501 (1978). The United States has an interest in protecting government employees from meritless and unduly burdensome litigation that may interfere with their exercise of lawful discretion in their official functions and deter qualified individuals from public service. The United States also has an interest in ensuring effective deterrence of unconstitutional conduct by government employees, and in ensuring that adequate remedies exist for violations of constitutional rights.

This case is one of approximately 500 *Bivens* cases filed each year against personnel of the United States Bureau of Prisons (Bureau or BOP).[1] The Bureau consists of 79 prisons, six regional offices, and the Central Office in Washington, D.C. The majority of Bureau personnel are line staff, such as Correctional Officers, Correctional Counselors, Case Managers, and Unit Managers. The responsibilities of line staff require close daily contact with the inmate population and call upon the staff to exercise discretion in preserving inmate discipline and providing for the needs of inmates and the safety and security of inmates and staff. The Bureau trains and encourages its line staff to interact frequently with inmates in order to anticipate and resolve conflicts without unnecessary confrontations.

Programming and administrative staff also have frequent, close interaction with inmates. The discipline and other restrictions those officials impose, and the services they provide—including intake and assignment to living quarters, provision of health care, and supervision of educational and work activities—have an important impact on inmates' conditions of confinement. Prison administrators, regional staff, and Central Office staff make policy and management decisions that affect local staff action, and, in turn, the inmates themselves. Administrators also

[1] Claims are also made in this case against respondent Loye W. Miller, Jr., former Director of Public Affairs at the Department of Justice.

make appeal decisions in disciplinary cases and other administrative claims. See generally 28 C.F.R. 542.10-542.16.

Contact between all levels of BOP staff and inmates in the often adversarial environment of incarceration generates numerous allegations by inmates that actions were taken against them for unlawful reasons. The vast majority of these allegations have proven unfounded.[2] The comprehensive control exercised by prison staff over the inmate population also carries with it, however, the risk that staff members may at times abuse their authority and violate inmates' constitutional rights. Careful accommodation is therefore required between preserving the right to redress when constitutional violations occur, and limiting the impact of meritless inmate claims that are costly to litigate, impose substantial burdens on institutional management and individual defendants, and have the cumulative effect of depriving the public of the ability of government officials to make difficult decisions with the appropriate level of confidence.

STATEMENT

1. Petitioner brought this case to challenge what he alleges were adverse actions taken by respondents in retaliation against him for his exercise of speech rights protected by the First Amendment.[3] The district court's

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[2] In the three years from 1992 through 1994, there was a monetary settlement in approximately 16 of the 1,513 cases against BOP officials that included *Bivens* claims, and two of the dozen such cases that went to trial during that period resulted in a judgment in favor of the plaintiff.

[3] Petitioner also brought a *Bivens* claim of violation of his Fifth Amendment due process rights, and claims against the United States and respondent Quinlan, in his official capacity as BOP Director, under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2511. Only the First Amendment *Bivens* claim is before this Court.

decision was rendered in response to respondents' motion for summary judgment. That court was therefore required, as was the court of appeals, to view the evidence in the light most favorable to petitioner. Except where indicated, the following summary of the facts is taken from the court of appeals' opinion (Pet. App. 3a-7a).[4]

The events giving rise to this case began shortly before the November, 1988, presidential election. Petitioner was incarcerated at the El Reno Federal Correctional Institution (El Reno) in El Reno, Oklahoma, serving a 51-year sentence for drug and explosives violations. He was placed in administrative detention on three different occasions, twice before and once after the election. He alleges that those placements were either intended to deny him access to the press or were in retaliation for his exercise of free speech rights. Respondents, on the other hand, maintain that the detentions were motivated by lawful official purposes—to ensure petitioner's safety and in response to charges that petitioner had violated prison rules regarding "third party" telephone calls. Pet. App. 7a.

Several days before the election, petitioner spoke by telephone with journalist Nina Totenberg and claimed that he had sold marijuana to Dan Quayle, the Republican candidate for Vice President, when Quayle was a law student in the early 1970s. Totenberg arranged for petitioner to make an affidavit recounting his version of events, which she showed to high-level members of the Bush/Quayle campaign. Totenberg did not broadcast the story, however, because she could not corroborate it. Pet. App. 3a, 21a-22a; C.A. App. 79.

Other news organizations heard of petitioner's allegations. On November 3, the Thursday before the election, NBC News contacted El Reno officials and requested an

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[4] The factual record included substantial discovery relating to the non-*Bivens* claims, which was conducted notwithstanding a narrow stay of discovery applied only to the *Bivens* claims. Some of the discovery that petitioner obtained relating to his other claims proved relevant to his First Amendment *Bivens* claim.

in-person interview with petitioner. El Reno officials offered to arrange an interview on November 8, election day, but NBC responded that that would be too late, and threatened to run a "cover-up" story if an earlier interview were not arranged. On Thursday, November 3, the Bureau's Central Office instructed El Reno officials to arrange for an earlier interview, and NBC taped an interview with petitioner on Friday, November 4. NBC ultimately decided not to broadcast the story. Pet. App. 3a, 22a; C.A. App. 12-13, 94.

After the NBC interview, other media organizations sought to interview petitioner. El Reno's Acting Warden suggested that a group interview be set up to make it less burdensome on the institution to handle the volume of inquiries. The Executive Assistant to the El Reno Warden told petitioner on November 4 that he would set up a "press conference" for that evening at 7:00 p.m. Pet. App. 4a, 22a.

On either November 3 or November 4, Bush/Quayle campaign officials learned of petitioner's allegations and a campaign official telephoned the Bureau "for additional information" and learned of the November 4 NBC interview. Pet. App. 3a; C.A. App. 96. The campaign Press Secretary spoke with respondent Loye Miller, the then-Director of Public Affairs at the Department of Justice, and said he was "amazed" that petitioner was to hold a press conference. Miller responded, "Well, amazed or not, he's going to have one. It's within his rights to have one according to the rules and regulations." Pet. App. 4a, 26a-27a. However, respondent J. Michael Quinlan, then-Director of the BOP, instructed the El Reno authorities to cancel the press conference because "the Bureau's policy on media access permits individual media contacts by inmates, as well as small press pools under specialized circumstances, but does not authorize inmate press conferences." *Id.* at 4a; C.A. App. 95; see 28 C.F.R. 540.60-540.65. Quinlan asserted that he had not allowed an inmate press conference during his tenure as BOP Director. Pet. App. 4a.

a. *November 4 Detention.* At approximately 11:30 p.m. on November 4, petitioner was placed in administrative detention at Quinlan's direction, pending investigation of allegations that petitioner had told a news reporter that he was in danger. Pet. App. 5a; C.A. App. 67. The administrative detention order by El Reno officials recited that petitioner had "stated to the National news media this [sic] his life is in danger and so is being placed in Administrative Detention for his protection." Pet. App. 5a, 24a; C.A. App. 48. Petitioner contends that he was expressly prohibited from making telephone calls until the afternoon of November 5. Pet. 6; Pet. App. 24a; C.A. App. 74.[5] While petitioner was in detention, the Bush/Quayle campaign Press Secretary again called Miller and "noted the obvious: that the closer to the Tuesday election that the story were to break, the more attention it was likely to get, and the better the chance that it could have at least some adverse effect on the Bush-Quayle chances." Pet. App. 5a-6a; C.A. App. 85. According to Miller, however, the Press Secretary "did not try in any way to influence the department's handling of Kimberlin." Pet. App. 6a; C.A. App. 85. Petitioner was released from administrative detention at 7:30 p.m. on Saturday, November 5. Pet. App. 6a, 23a.

b. *November 7 Detention.* After he was released from administrative detention on November 5, petitioner made several telephone calls in order to schedule a group telephone interview with reporters, who planned to gather for that purpose at the Mayflower Hotel in Washington, D.C., on the morning of Monday, November 7. Pet. App. 23a. At approximately 9:00 a.m. on November 7, before the

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[5] However, in responses to requests for admissions filed in 1993, after the issuance of the district court order denying respondents' motion to dismiss or for summary judgment, petitioner admitted that he was briefly removed from his detention cell on the afternoon of November 5 in order to telephone Nina Totenberg. Plaintiff's Responses to Defendants' Request For Admissions, Question 1 (Feb. 16, 1993).

time scheduled for the group telephone interview, petitioner was again placed in administrative detention, where he remained for seven days. *Ibid.*; C.A. App. 75. Petitioner contends that he was not permitted to make telephone calls during this time, except to his lawyer. Pet. App. 23a; C.A. App. 75.[6] The reason given for that detention was violation of a prison regulation prohibiting inmates from making third-party telephone calls, *i.e.*, calls made to one party, and then electronically transferred by that party to a third party. Pet. App. 6a (citing 28 C.F.R. 540.104). On November 14, after an administrative hearing at which petitioner was found guilty of violating the telephone regulation, he was released from administrative detention. Pet. App. 6a, 25a-26a.

c. *December 22 Detention.* Petitioner was again placed in administrative detention on December 22, the day after he held two telephone interviews, and a few days after news stories appeared recounting his conflicts with prison officials. The reason given was violation of the prohibition on third-party telephone calls. Petitioner was released from detention on December 23, and was found not guilty of the violation because there was "no specific evidence that [he] intentionally placed a conference/third-party call." Pet. App. 6a-7a.

2. On August 15, 1990, petitioner filed suit including, *inter alia*, a *Bivens* claim that respondents had placed him in detention in violation of his First Amendment rights. Respondents promptly moved to dismiss or for summary judgment on grounds of qualified immunity. The district court stayed discovery relating to the *Bivens* claims pend-

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[6] Although petitioner contends that he was denied communication with the news media, his subsequent responses to requests for admissions reflect that, "at some point during his detention, prison officials briefly removed [petitioner] from his cell and brought him to the office of [the Executive Assistant to the El Reno Warden], where he was interviewed on camera" by a member of the news media. Plaintiff's Responses to Defendants' Request For Admissions, Question 17 (Feb. 16, 1993).

ing resolution of the qualified-immunity question. Pet. App. 2a; see C.A. App. 3 (referring to order dated 11/26/90).[7]

On August 6, 1991, the district court held that respondents were not entitled to qualified immunity. Pet. App. 44a-62a. "[I]f [respondents] were motivated by a purpose to keep [petitioner] from speaking to the press because of the content of his expected communications, their conduct violated a well-established right, and qualified immunity would not attach[] to their actions." *Id.* at 48a. The court held that a heightened pleading standard applicable to *Bivens* claims required "allegations that are tangible and nonconclusory, even if these allegations would properly be regarded as circumstantial (as distinguished from direct or testimonial)." *Id.* at 52a. Petitioner, in the court's view, met that standard. *Id.* at 53a-56a. Reasoning that the decision of the District of Columbia Circuit in *Siegert* v. *Gilley*, 895 F.2d 797 (1990), aff'd on other grounds, 500 U.S. 226 (1991), was "susceptible of more than one interpretation," the district court did not apply *Siegert*'s "direct evidence" rule. Pet. App. 50a. It held that *Siegert* should not be read to require a *Bivens* plaintiff to plead direct evidence, because "circumstantial evidence is intrinsically no different than direct evidence." *Id.* at 52a. Having denied the qualified-immunity motion, the court lifted the discovery stay. *Id.* at 63a.

3. Respondents took an interlocutory appeal, and the court of appeals reversed. Pet. App. 1a-43a. In a divided decision, the court held that an elevated standard of pleading and proof applies where a plaintiff "sues government officials and alleges unconstitutional motive." *Id.* at 8a. That standard requires "pleading of specific *direct* evidence of intent to defeat a motion to dismiss and subsequent production of such evidence to defeat a motion for

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[7] As noted, see note 4, *supra*, discovery relating to the non-*Bivens* claims was not, however, stayed.

summary judgment." *Id.* at 9a.[8] Petitioner failed to meet that standard because he did not proffer "*direct* evidence of unconstitutional motive on the part of the two defendants and was precluded from relying on mere circumstantial evidence." *Id.* at 12a-13a. Petitioner "relie[d] only on inference and weak circumstantial evidence, notably the timing of events, to support his claim of unconstitutional detention by [respondents]." *Id.* at 17a.[9] The court of appeals denied petitioner's suggestion for rehearing en banc. *Id.* at 64a-75a.

SUMMARY OF ARGUMENT

I. The decision of the District of Columbia Circuit dismissing petitioner's First Amendment claim for want of direct, as opposed to circumstantial, evidence of retaliatory motive is in error and should be reversed. The District of Columbia Circuit adopted the direct-evidence rule in order to prevent baseless allegations of unconstitutional motive from defeating a qualified-immunity defense, and thereby to protect public employees' ability to carry out the traditional functions of government. The direct-evidence rule, however, is an inappropriate means to achieve that objective.

The District of Columbia Circuit is alone in requiring direct evidence of motive. The direct-evidence rule conflicts with decisions of this Court establishing that circumstantial evidence is intrinsically no less probative than

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[8] The court noted that, although other circuits had "refrain[ed] from adopting the direct/circumstantial distinction," most circuits had adopted some form of heightened pleading standard. Pet. App. 9a-10a & n.10.

[9] "[A]s [applied] here, at the summary judgment stage," the court stated, "the expression 'heightened pleading' is a misnomer because the enhanced standard requires a greater evidentiary showing rather than enhanced pleading." Pet. App. 9a n.8 (citing *Elliott* v. *Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), cert. denied, 502 U.S. 1074, 1121 (1992).

direct evidence, and that proof of intent may be made with either or both types of evidence. Moreover, the direct-evidence rule does not facilitate the application of qualified immunity as *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), defines it, and can weed out even strong claims in an effort to bar insubstantial ones.

II. This Court should adopt a "heightened pleading" standard in qualified-immunity cases in which unconstitutional motive is alleged. Under that standard, once a defendant asserts a qualified-immunity defense, the plaintiff must allege specific and concrete facts showing why the defense cannot be sustained. Additional detail is required in cases in which a qualified-immunity defense is raised in order to permit district courts to decide at the outset, before discovery, whether the defense applies so that the case should be dismissed.

A requirement of heightened specificity has a strong basis in precedent. Every circuit that has addressed the issue has adopted such a requirement, and four Justices of this Court have also endorsed a requirement of heightened specificity as an appropriate implementation of qualified immunity. The courts are in close agreement regarding the verbal formulation of the standard, and they support requiring the degree of heightened specificity we urge. Unlike the heightened-pleading rule this Court rejected for civil rights claims not subject to a qualified-immunity defense, a requirement of greater specificity from plaintiffs in response to an assertion of a qualified-immunity defense does not conflict with Federal Rules of Civil Procedure 8 and 9(b). Cf. *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993).

ARGUMENT

This Court has allowed limited forms of money damage actions against government officials in their personal capacities for actions taken under color of federal law, but the Court at the same time has been acutely aware of "the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability." *Scheuer* v. *Rhodes*, 416 U.S. 232, 239 (1974). The need to provide government officials protection from personal-capacity suits stems from the potential injustice "of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion," and "the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.* at 240. See also *Wyatt* v. *Cole*, 112 S. Ct. 1827, 1833 (1992).

The qualified immunity provided by *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806 (1982), is intended to preserve the ability of government officials to serve the public good and to ensure that able candidates for government office will not be deterred by the threat of damage suits from entering public service. *Wyatt*, 112 S. Ct. at 1833. Qualified immunity "strikes a balance between compensating those who have been injured by official conduct and protecting the government's ability to perform its traditional functions." *Ibid.* The immunity is intended to "spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit," *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991), *i.e.*, the costs, burdens, and distractions of the suit itself. See *Wyatt*, 112 S. Ct. at 1832-1833; *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). Qualified immunity seeks to avoid, wherever possible, "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell*,

472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 816). Thus, qualified immunity is concerned not only with protecting public officials from personal *liability*; it also aims to ensure "the dismissal of insubstantial lawsuits *without trial*." *Harlow*, 457 U.S. at 814 (emphasis added).

Recognizing the need to protect against these dangers, this Court's "decisions consistently have held that government officials are entitled to some form of immunity from suits for damages." *Harlow*, 457 U.S. at 806. As this Court has explained:

> Implicit in the idea that officials have some immunity —absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to asume that it is better to risk some error and possible injury from such error than not to decide or act at all.

Scheuer, 416 U.S. at 242. A government official's immunity from suit is not "a badge or emolument of exalted office," but rather is grounded on principles of public policy—"a policy designed to aid in the effective functioning of government." *Ibid.* (quoting *Barr* v. *Matteo*, 360 U.S. 564, 572-573 (1959) (opinion of Harlan, J.)). To deny such immunity would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), cert. denied, 339 U.S. 949 (1950). An effective qualified-immunity defense requires rules that will not permit frivolous or plainly non-meritorious suits to deter officials from confident exercise of their lawful discretion.

I. THE COURT OF APPEALS ERRED IN RESPONDING TO THE SERIOUS CONCERNS OF *HARLOW* BY REQUIRING PETITIONER TO PRESENT DIRECT RATHER THAN CIRCUMSTANTIAL EVIDENCE OF UNCONSTITUTIONAL MOTIVE SUPPORTING HIS FIRST AMENDMENT *BIVENS* CLAIM

In *Bivens* actions in which the constitutional violation requires proof of unlawful intent, the District of Columbia

Circuit--in an attempt to respond to concerns articulated in *Harlow*—applies two doctrines to protect government officials from baseless or insubstantial claims. First, in all cases involving qualified immunity, the District of Columbia Circuit (and most other circuits, see p. 21 & n.22, *infra*) requires "heightened pleading," whereby in response to a defense of qualified immunity, the plaintiff must "plead the facts surrounding the alleged violation with sufficient 'detail[] to enable the district court to decide at the outset whether [the] action may proceed to discovery and trial.' " *Kartseva* v. *Department of State*, 37 F.3d 1524, 1530-1531 (D.C. Cir. 1994) (quoting *Hunter* v. *District of Columbia*, 943 F.2d 69, 75 (D.C. Cir. 1991)). In addition, where the claim turns on an allegation of improper motive, the District of Columbia Circuit requires that those facts be supported by "specific *direct* evidence" of such motive. Pet. App. 9a.[10] Only then is the plaintiff permitted to embark on discovery. In this case, the court of appeals considered only the second of those tests and held that, because petitioner's First Amendment claim was unsupported by direct evidence of unconstitutional retaliatory motive, respondents are entitled to judgment in their favor on that claim. *Ibid.* In our view, the requirement of "heightened pleading" is appropriate—indeed essential—but the direct-evidence rule is not.

This Court has repeatedly recognized the importance of protecting public officials against the burdens of litigating baseless claims, and the District of Columbia Circuit sought to advance that goal in adopting the direct-evidence rule. The rule, however, does not properly respond to that concern. It has been rejected by every other court of appeals that has considered it[11] and has been

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[10] This requirement applies to all constitutional claims of which any subjective state of mind—such as intent, motive, or purpose—is a required element of proof. This brief uses interchangeably those various terms for state of mind, and no material difference is intended.

[11] See *Tompkins* v. *Vickers*, 26 F.3d 603, 608-609 (5th Cir. 1994); *Elliott* v. *Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), cert. denied,

called into question by four Justices of this Court [12] and by six of the District of Columbia Circuit judges that considered the rule in this case.[13] This Court should reverse the judgment of the court of appeals and remand petitioner's *Bivens* claim for further proceedings.

A. The Direct-Evidence Rule Was Designed To Give Public Officials Added Protection From Motive-Based Damage Claims

The District of Columbia Circuit's direct-evidence rule applies to *Bivens* or Section 1983 damage claims against government officials in their individual capacities in which subjective state of mind is an element of the claim. Under the rule, a complaint in such a case that does not, before discovery commences, identify direct (as opposed to circumstantial) evidence supporting the plaintiff's allegations of unlawful motive cannot survive a defendant's motion to dismiss based on qualified immunity. Pet. App. 9a & n.9; *Siegert* v. *Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990) (intent "must be pleaded with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent"), aff'd on other grounds, 500 U.S. 226 (1991). Similarly, the plaintiff must produce such direct evidence in order successfully to oppose a pre-discovery motion for summary judgment. Pet. App. 9a & n.8; *Whitacre* v. *Davey*, 890

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502 U.S. 1074, 1121 (1992); *Branch* v. *Tunnell* (*Branch I*), 937 F.2d 1382, 1386-1387 (9th Cir. 1991); *Crutcher* v. *Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989).

[12] See *Siegert*, 500 U.S. at 235-236 (Kennedy, J., concurring); *id.* at 246 (Marshall, J., joined by Blackmun and Stevens, JJ., dissenting).

[13] Pet. App. 17a-19a (Williams, J., concurring); *id.* at 30a (Edwards, J., dissenting); *id.* at 65a (Williams, J., joined by Silberman and Buckley, JJ., concurring in denial of rehearing en banc) (stating that "[t]he imperfections of our 'direct evidence' rule are plain to see"); *id.* at 67a (Silberman, J., concurring in denial of rehearing en banc) ("Those who criticize this circuit's direct versus circumstantial evidence distinction * * * have a logical point."); *id.* at 74a-75a (Edwards, J., joined by Wald, J., and Mikva, C.J., dissenting from denial of rehearing en banc).

F.2d 1168, 1171 & n.4 (D.C. Cir. 1989) (emphasizing that, in order to defeat a motion for summary judgment based on qualified immunity, a plaintiff must come forward with direct evidence before obtaining any discovery), cert. denied, 497 U.S. 1038 (1990). Direct evidence is also required where, as in this case, a summary-judgment motion was filed after some discovery was taken. Pet. App. 12a-13a, 17a.

In adopting the direct-evidence rule, the District of Columbia Circuit reasoned that, under *Harlow*, inquiries regarding a defendant official's subjective intent may conflict with the goals of qualified immunity to dispose promptly of insubstantial claims. Before *Harlow*, public officials were entitled to qualified immunity from suit when they had "reasonable grounds for the belief [in the legality of their action] formed at the time and in light of all the circumstances, *coupled with good-faith belief*." *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978) (emphasis added) (quoting *Scheuer*, 416 U.S. at 247-248). The Court in *Harlow* observed, however, that "[t]he subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* [v. *Economou*, 438 U.S. 478 (1978)], that insubstantial claims should not proceed to trial," because "an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury." *Harlow*, 457 U.S. at 815-816. As long as determination of the official's state of mind was an element of the qualified-immunity defense, analysis whether that immunity was available required "[j]udicial inquiry into subjective motivation," *id.* at 817, often increasing rather than reducing a defendant's discovery and trial burdens. *Harlow* accordingly held that the availability of qualified immunity should turn not on the official's subjective "good faith," but on the objective, legal question whether the right asserted by the plaintiff was clearly established at the time of the action in question. *Id.* at 818.

Proof of state of mind is also, however, an element of many constitutional claims, including claims of unconsti-

tutional discrimination, see *Washington* v. *Davis*, 426 U.S. 229, 239 (1976) (requirement of proof of discriminatory purpose), cruel and unusual punishment, *Estelle* v. *Gamble*, 429 U.S. 97, 104-105 (1976) (deliberate indifference), and, as in this case, punishment allegedly based on the content of protected speech, *Pell* v. *Procunier*, 417 U.S. 817, 828 (1974). Thus, although a state-of-mind inquiry is no longer part of the qualified-immunity *defense* under *Harlow*, an objectively based immunity defense cannot prevent plaintiffs from pleading unconstitutional motive as an element of their own *claims*.[14] Since the law barring intentional violations of rights by government actors is likely to be clearly established,[15] the District of Columbia Circuit recognized "the danger that plaintiffs might allege facts consistent with lawful conduct and append a claim of unconstitutional motive, thus imposing on officials the very costs and burdens of discovery and possibly trial that *Harlow* intended to spare them." *Siegert*, 895 F.2d at 801 (citing *Hobson* v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985)).

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[14] Like all other circuits that have considered the question, the District of Columbia Circuit considered and rejected the notion that *Harlow*'s statement that "bare allegations of malice should not suffice to subject government officials to the costs of trial or to the burdens of broad-reaching discovery," 457 U.S. at 817-818, rendered defendants completely immune from intent-based constitutional damage claims. The court thus expressly declined to adopt an interpretation of *Harlow* that "would insulate officials from liability in all cases in which the substantive prescription makes the official's state of mind an essential component of the alleged constitutional violation." *Martin* v. *D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1433 (D.C. Cir. 1987); see also *Siegert*, 895 F.2d at 801 ("[I]t is by no means clear that the Supreme Court intended this expansive language to preclude *any* inquiry into subjective motivation.").

[15] For example, government officials may, in general, discipline their subordinates for noncompliance with valid work requirements. Such otherwise constitutional actions, however, become unconstitutional when taken because of a subordinate's political or religious views. See *Waters* v. *Churchill*, 114 S. Ct. 1878, 1885 (1994) (plurality opinion).

B. The Direct-Evidence Rule Conflicts With This Court's Precedents

The risks identified by the District of Columbia Circuit are serious. But the appropriate antidote—as every other court that has considered the issue has concluded—is *not* to draw an artificial distinction between direct and circumstantial evidence. As Justice Kennedy recognized in his concurring opinion in *Siegert* v. *Gilley*, 500 U.S. 226, 235-236 (1991),[16] the District of Columbia Circuit's direct-evidence rule conflicts with this Court's decision in *Holland* v. *United States*, 348 U.S. 121 (1954), which held that "[c]ircumstantial evidence * * * is intrinsically no different from testimonial evidence." *Id.* at 140.[17] That principle is well established in the law governing proof of state of mind,[18] and it was a factor in the Fifth

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[16] See also *Siegert*, 500 U.S. at 246 (Marshall, J., dissenting, joined by Blackmun and Stevens, JJ.) ("the Court of Appeals erred in holding that a district court may not permit limited discovery in a case involving unconstitutional motive unless the plaintiff proffers *direct* evidence of the unconstitutional motive").

[17] The *Holland* Court stated that, "[a]dmittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference." 348 U.S. at 140. See also *Wyatt*, 112 S. Ct. at 1837 (Kennedy, J., joined by Scalia, J., concurring) (the question of intent "is a factual one, and a plaintiff may rely on circumstantial rather than direct evidence to make his case").

[18] See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) ("[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," and direct evidence is not required); *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. * * * [T]he District Court should not have required [the plaintiff] to submit direct evidence of discriminatory intent."); *Herbert* v. *Lando*, 441 U.S. 153, 165 & n.15 (1979) ("courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant and necessary to defeat a conditional privilege or

and Seventh Circuits' decisions to reject the direct-evidence rule, see *Tompkins* v. *Vickers*, 26 F.3d 603, 608-609 (5th Cir. 1994) ("Circumstantial evidence is equally as probative as direct evidence in proving illegitimate intent."); *Elliott* v. *Thomas*, 937 F.2d 338, 345 (7th Cir. 1991) ("we agree with Justice Kennedy['s opinion concurring in the judgment in *Siegert*] that there is no principled difference between direct and circumstantial evidence"), cert. denied, 502 U.S. 1074, 1121 (1992). An opposing party's state of mind is, by its nature, difficult to prove, and is most often proved by circumstantial evidence. Thus, we continue to adhere to the position we took in *Siegert* that the direct-evidence rule would conflict with *Holland*. Br. for the Resp. at 20 n.13 (No. 90-96).

Moreover, the direct-evidence rule does not facilitate application of qualified immunity as *Harlow* defines it. Unlike requirements of heightened specificity, discussed in Point II below, the direct-evidence rule does not aid the court in determining whether the right plaintiff asserts was clearly established. Indeed, because motive-based claims ordinarily (although certainly not always) *do* rest on clearly established law, the direct-evidence rule provides immunity notwithstanding *Harlow*'s contemplation that, where governing law is clearly established, "the immunity defense ordinarily should fail." 457 U.S. at 818-819. The direct-evidence rule thus creates a wholly new "immunity" based not on the reasonableness of the official defendant's conduct, but on whether the plaintiff has, fortuitously, been able to secure direct, rather than circumstantial, evidence of unconstitutional motive or purpose.

As Judge Williams correctly observed, the distinction between direct and circumstantial evidence also is "completely arbitrary and unrelated to the strength of the plaintiff's case." Pet. App. 18a. The direct-evidence rule

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enhance damages"); see also *Farmer* v. *Brennan*, 114 S. Ct. 1970, 1984 (1994) (prisoner asserting Eighth Amendment claim of prison officials' deliberate indifference to known risks "may establish respondents' awareness by reliance on any relevant evidence").

arbitrarily blocks even strong claims in the salutary effort to eliminate unfounded ones.[19] Qualified immunity is intended to "strike[] a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt*, 112 S. Ct. at 1833. The direct-evidence rule does not strike that balance. Neither the severity of the wrong at issue, nor the strength of the potential proof, necessarily correlates with whether evidence is direct or circumstantial. The most egregious wrongs, including those that violate criminal law, are typically proved by circumstantial evidence in our legal system. Indeed, even the strictest standard of proof imposed by our law—the beyond-a-reasonable-doubt standard applicable in criminal cases—does not require direct evidence for its satisfaction.[20]

Requiring direct evidence of motive before any discovery may be had is especially inappropriate in view of the fact that "evidence of such intent is peculiarly within the control of the defendant." *Siegert*, 500 U.S. at 246 (Marshall, J., joined by Blackmun and Stevens, JJ., dissent-

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[19] *Harlow*'s qualified-immunity standard properly bars recovery for actions that a reasonable public official cannot fairly be presumed to know are unconstitutional. That is quite different from excusing purposeful discrimination, deliberate disregard of prisoners' health or safety, retaliation for the content of protected speech, or other unconstitutional conduct taken with an unlawful subjective motive, simply because the plaintiff lacks direct evidence of such an intent even before discovery has taken place. See Balcerzak, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 Yale L.J. 126, 141 (1985) (concluding that qualified immunity should not be construed to "preclude effective redress for those constitutional violations for which victims are most in need of compensation and for which officials are least deserving of immunity"—*i.e.*, intent-based constitutional claims).

[20] It would, for example, be anomalous to prevent, based on absence of direct evidence, a victim of a criminal violation of federal civil rights laws, see 18 U.S.C. 241, 242, from litigating a claim for damages against public officials convicted of that criminal violation on the basis of circumstantial evidence.

ing). As the Fifth Circuit, for example, observed in *Tompkins*, 26 F.3d at 609, "direct evidence of an improper motive is usually difficult, if not impossible, to obtain. Thus, requiring direct evidence would effectively insulate from suit defendants who deny an improper motive in cases such as this." The Ninth Circuit, too, held that "[b]ecause evidence of intent is largely within the control of the defendant and often can be obtained only through discovery, we are unwilling to require a plaintiff to present direct evidence of that intent in order to avert dismissal." *Branch* v. *Tunnell* (*Branch I*), 937 F.2d 1382, 1386-1387 (1991). The Seventh Circuit similarly observed that "[r]equiring 'direct' evidence of intent would be fatal in all but the rare case in which the defendant confessed." *Elliott* v. *Thomas*, 937 F.2d at 345. This Court, in accord with the weight of the decisional law in this area, should reject the direct-evidence rule.

II. PLAINTIFFS SHOULD BE REQUIRED TO RESPOND TO ASSERTIONS OF QUALIFIED IMMUNITY WITH HEIGHTENED SPECIFICITY IN ORDER TO FACILITATE PROMPT RESOLUTION OF THE QUALIFIED-IMMUNITY QUESTION

The requirement that a plaintiff respond to a qualified-immunity defense with a *factually specific* statement of the claim that a clear right has been violated is, in our view, an important tool in implementing the mandate of *Harlow* that, until the "threshold immunity question is resolved, discovery should not be allowed." 457 U.S. at 818. The purpose of the additional detail in allegations is to permit the district courts to determine whether claims should be dismissed on qualified-immunity grounds. The requirement of heightened specificity facilitates the determination whether the relevant law, as it related to the actual circumstances a particular public official faced when he or she engaged in challenged conduct, was clearly established. Because the rule does not actually affect the standard of pleading under Federal Rule of Civil Procedure 8, but operates like the Motion for a More Definite Statement authorized by Rule 12(e), it is consistent with

the Rules and with this Court's decision in *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993).

A. All Courts Agree That Heightened Specificity Is Appropriate To Motive-Based Claims, And The Courts Are In Close Accord Regarding The Precise Articulation Of The Standard

In our view, *Bivens* and Section 1983 actions, like all other actions not covered by Federal Rule of Civil Procedure 9(b), may be initiated by pleading that satisfies the standard set forth in Rule 8. Once a defendant raises a defense of qualified immunity, however, additional specificity is required. We believe that the appropriate standard is the one we proposed in our brief to this Court in *Siegert* v. *Gilley*, which is fairly encapsulated as follows:

> A plaintiff may not rely solely on subjective allegations. Attenuated inferential and circumstantial allegations, or otherwise conclusory allegations are not sufficient. Rather, a plaintiff must allege specific and concrete facts raising a genuine issue regarding the objective reasonableness of respondent's conduct.

See Br. for the Resp. at 20 n.13, 26 (No. 90-96). The four Justices who discussed the issue in *Siegert* v. *Gilley*, 500 U.S. 226 (1991), agreed that courts may properly require additional specificity of allegations in qualified-immunity cases.[21] All the circuits that have considered the issue have held that a requirement of "heightened pleading" is appropriate in qualified-immunity cases.[22]

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[21] 500 U.S. at 236 (Kennedy, J., concurring) ("Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal."); *id.* at 246 (Marshall, J., joined by Blackmun and Stevens, JJ., dissenting) ("In my view, a plaintiff pleading a *Bivens* claim that requires proof of the defendant's intent should be afforded such discovery whenever the plaintiff has gone beyond bare, conclusory allegations of unconstitutional purpose.").

[22] *District of Columbia Circuit: Kartseva*, 37 F.3d at 1531 (a plaintiff must "plead the facts surrounding the alleged violation

Our verbal formulation of the standard is in close accord with the formulations used by the courts of appeals and by those Justices in *Siegert* who addressed the need for a standard of heightened specificity.

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with sufficient 'detail[] to enable the district court to decide at the outset whether [the] action may proceed to discovery and trial' over a qualified immunity defense"); *Hobson* v. *Wilson*, 737 F.2d at 29 (allegations must be "sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds"); *Martin* v. *Malhoyt*, 830 F.2d 237, 254 (1987) (relying on *Hobson* to hold that a plaintiff must "specify the 'clearly established' rights they allege to have been violated with 'sufficient[] precis[ion] to put defendants on notice of the nature of the claim and enable them to prepare a response' "); *Crawford-El* v. *Britton*, 951 F.2d 1314, 1317 (1991) (following *Hobson*), cert. denied, 113 S. Ct. 62 (1992); *Andrews* v. *Wilkins*, 934 F.2d 1267, 1269-1270 (1991) (same).

Other Circuits: See, *e.g.*, *Gooden* v. *Howard County*, 954 F.2d 960, 969-970 (4th Cir. 1992) (en banc) (requiring that the plaintiff "plead specific facts in a nonconclusory fashion"); *Babb* v. *Dorman*, 33 F.3d 472, 477 (5th Cir. 1994) (requiring that a complaint "state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of [qualified] immunity"); *Colle* v. *Brazos County*, 981 F.2d 237, 246 (5th Cir. 1993) ("when government officials are likely to invoke qualified immunity, we demand that a complaint state factual detail and particularity including why the defendant-official cannot maintain the immunity defense"); *Nuclear Transp. & Storage, Inc.* v. *United States*, 890 F.2d 1348, 1355 (6th Cir. 1989) (where qualified immunity is a potential defense, "greater specificity should be required in order to support the contention that a plea of immunity cannot be sustained"), cert. denied, 494 U.S. 1079 (1990); *Elliott* v. *Thomas*, 937 F.2d at 344-345 (requiring the plaintiff "to produce 'specific, nonconclusory factual allegations * * * or face dismissal' ") (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment)); *Branch* v. *Tunnell* (*Branch II*), 14 F.3d 449, 452 (9th Cir.) ("The allegations of facts must be specific and concrete enough to enable the defendants to prepare a response, and where appropriate, a motion for summary judgment based on qualified immunity."), cert. denied, 114 S. Ct. 2704 (1994); *Pueblo Neighborhood Health Ctrs., Inc.* v. *Losavio*, 847 F.2d 642, 649 (10th Cir. 1988) ("[P]laintiffs cannot rely on conclusory allegations; they must produce some specific factual support for their claim of unconstitutional motive.").

Courts have adopted "heightened pleading" in response to the same risks that motivated the District of Columbia Circuit to adopt the direct-evidence rule.[23] Judge Easterbrook, for example, in a case in which a discharged public employee sought discovery into her former employers' allegedly retaliatory motive, explained:

> [Plaintiff] wants discovery and a trial to probe the defendants' mental processes * * *. Yet *Harlow* eliminated the subjective component from official immunity (formerly "good faith immunity", a telling phrase) because searching for intent and other components of knowledge blocks the use of immunity as a shortcut to decision. Official immunity creates a "right not to be tried"; yet if by arguing that the defendants acted with forbidden intent the plaintiff may obtain exhausting discovery and trial, the promise of a "right not to be tried" is a hoax.

Elliott v. *Thomas*, 937 F.2d at 344 (citations omitted). The Seventh Circuit responded to this "conundrum" by embracing the standard favored by Justice Kennedy, concurring in *Siegert* v. *Gilley*, that would require "specific, nonconclusory factual allegations which establish [the necessary mental state], or face dismissal." 937 F.2d at 344-345 (quoting 500 U.S. at 236).[24]

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[23] See *Tompkins*, 26 F.3d at 608; *Elliott* v. *Thomas*, 937 F.2d at 344; *Branch I*, 937 F.2d at 1385.

[24] There is a conflict among the circuits as to whether the requirement of additional specificity applies to all claims to which qualified immunity is raised as a defense, or only to motive-based claims. Compare *Kartseva*, 37 F.3d at 1530-1531 (D.C. Cir.) (heightened pleading not restricted to motive-based claims) and *Babb* v. *Dorman*, 33 F.3d 472, 477 (5th Cir. 1994) (same) with *Mendocino Envtl. Ctr.* v. *Mendocino County*, 14 F.3d 457, 462 (9th Cir. 1994) (heightened pleading applicable only to motive-based claims), *Gooden* v. *Howard County*, 954 F.2d 960, 969-970 (4th Cir. 1992) (same), *Elliott* v. *Thomas*, 937 F.2d at 344-345 (7th Cir.) (same) and *Pueblo Neighborhood Health Ctrs.*, 847 F.2d at 649 (10th Cir.) (same). The question presented in this case asks only about the propriety of heightened pleading of motive-based claims. Because motive is an element of the constitutional claim in this case, and the circuits are in agreement that the heightened standard applies, at a mini-

B. The Specificity Requirement Facilitates Application Of Qualified Immunity As *Harlow* Defines It

Plaintiffs are required to allege their claims with heightened specificity in qualified-immunity cases in order to permit a determination by the court as to whether, under the factual circumstances, the relevant law was clearly established at the time of the alleged violation so as to defeat the defendant official's immunity. The level of specificity needed for the immunity determination is indicated by this Court's decision in *Anderson* v. *Creighton*, 483 U.S. 635 (1987). Under *Creighton*, whether challenged action violated clearly established law at the time it was taken "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.* at 639. A plaintiff cannot premise liability on a claim of "violation of extremely abstract rights." *Ibid.* The *Creighton* court explained:

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*.

Ibid.

In the absence of a requirement of heightened specificity in qualified-immunity cases, a complaint that can withstand a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and that in conclusory form asserts

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mum, to such claims, this case does not require the Court to decide whether the requirement of heightened specificity also applies to non-motive-based claims. In our view, however, the rationale supporting heightened specificity—the need to apply the qualified-immunity defense at the earliest feasible stage—is equally applicable to all claims to which qualified immunity is a defense.

a violation of a right that was clearly established at a general level, could open the door to discovery despite the existence of a valid qualified-immunity defense. That is because a complaint may be adequate under Rule 8, but not describe the nature of the right asserted with sufficient specificity to permit the qualified-immunity inquiry that *Creighton* requires. The courts of appeals have thus uniformly held that it is appropriate, where a qualified-immunity defense is raised, to elicit greater specificity from the plaintiff before discovery. They have done so to ensure that there will be a full opportunity to test whether the *allegations* state a violation of a clearly established right *before* discovery is allowed to unearth evidence to substantiate those allegations. In sum, properly construed, the heightened-specificity rule requires a plaintiff to come forward with detailed factual allegations, which can then be tested as a matter of law under Rule 12(b)(6) before the defendant files a motion for summary judgment under Rule 56(c), because a summary-judgment motion—*i.e.*, a dispositive motion supported by evidentiary material—requires an evidentiary response, and may thus prematurely trigger the plaintiff's demand for discovery.[25] The heightened-specificity requirement thus ensures that cases not proceed to discovery when they can be dismissed on immunity grounds.[26]

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[25] A defendant may move for summary judgment before discovery commences, but ordinarily, where one party moves for summary judgment and the other party has not yet had adequate (or any) opportunity for discovery, the nonmoving party is entitled to an opportunity to take discovery before filing an opposition to the motion. See Fed. R. Civ. P. 56(f); see also, *e.g.*, *Farmer* v. *Brennan*, 114 S. Ct. 1970, 1984-1986 (1994) (discussing need for remand of deliberate-indifference claim in view of district court's erroneous denial of Rule 56(f) motion). Thus, in the absence of a rule requiring added specificity, a risk remains that a plaintiff who files a pleading alleging a clearly established right in only general terms may proceed directly to discovery, and only face the qualified-immunity issue again at the summary-judgment stage.

[26] Even if the plaintiff satisfies the heightened specificity standard, however, courts must remain sensitive to concerns about the need to limit the burden of unwarranted litigation in ruling on

C. The Specificity Requirement Is Consistent With The Federal Rules Of Civil Procedure

The requirement of heightened specificity in response to a qualified-immunity defense, unlike the heightened pleading standard that some circuits had applied to civil rights claims generally, see *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, *supra*, is fully consistent with the Federal Rules of Civil Procedure. The Court in *Leatherman* unanimously rejected a judicially fashioned requirement of heightened pleading of civil rights claims. Because Federal Rule of Civil Procedure 9(b) imposes a requirement of pleading with heightened particularity only in two specified contexts—claims of fraud or mistake—and does not similarly impose such a requirement on claims of municipal liability under 42 U.S.C. 1983, *Leatherman* held that Section 1983 claims are governed by the Rule 8(a)(2) regime of "notice pleading." 113 S. Ct. at 1163. *Leatherman* expressly reserved the question whether the same logic would apply where qualified immunity may be a defense. *Id.* at 1162 (because municipalities enjoy no immunity from suit, "[w]e * * * have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving government officials").[27]

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whether evidence presented is sufficient to withstand a defendant's motion for summary judgment on the issue of motive. It may be appropriate to impose additional burdens on plaintiffs at the summary-judgment stage, other than the direct-evidence rule, to address the concerns that prompted the District of Columbia Circuit to embrace that rule. Such alternatives are for the lower courts to explore in this or similar cases.

[27] Several courts since *Leatherman* have relied on this Court's reservation of the issue and have continued to adhere to standards of heightened pleading in the qualified-immunity context. See, *e.g.*, *Babb*, 33 F.3d at 477 (continuing, in light of *Leatherman*, to require that complaint "state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of [qualified] immunity"); *Schultea* v. *Wood*, 27 F.3d 1112, 1115 n.2 (1994) (same), reh'g en banc granted, No. 93-2186 (5th Cir. Aug. 26, 1994); *Branch II*, 14 F.3d at 452, 455-457 (adhering after

The *Leatherman* rationale does not apply to the requirement of heightened specificity in the qualified-immunity context, because in that context it is not accurately described as a "pleading" requirement. Qualified immunity is an affirmative defense "that must be pleaded by a defendant official." *Siegert*, 500 U.S. at 231; see *Gomez* v. *Toledo*, 446 U.S. 635 (1980). As Judge Easterbrook explained in *Elliott* v. *Thomas*, "[a] possibility that the defendants will claim immunity does not require the plaintiff to anticipate and plead around that defense." 937 F.2d at 345.[28] Rather, once the defense is raised, plaintiff's allegations must be sufficiently specific to overcome that defense before plaintiff obtains discovery.[29] The fact

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Leatherman to requirement set forth in *Branch I* that the "complaint must contain nonconclusory allegations" of defendant's scienter); Pet. App. 9a n.9; *Jordan by Jordan* v. *Jackson*, 15 F.3d 333, 339 n.5 (4th Cir. 1994) (distinguishing in dictum the pleading question in qualified-immunity cases from the claim of municipal liability there at issue).

[28] In practice, the specificity requirement may shape plaintiffs' initial pleadings, since plaintiffs will have good reason to expect that a qualified-immunity defense will be raised and choose to make their pleadings more specific at the outset in an effort to eliminate a need to amend or supplement them later. Some courts, however, do appear to require the plaintiff to anticipate and plead around the defense of qualified immunity. See, *e.g.*, *Colle* v. *Brazos County*, 981 F.2d at 246 ("when government officials are likely to invoke qualified immunity, we demand that a complaint state factual detail and particularity including why the defendant-official cannot maintain the immunity defense"). As long as those courts allow a plaintiff whose initial complaint would fail the heightened standard "the opportunity to amend or supplement the pleadings freely, so that he may state his best case," *Wicks* v. *Mississippi State Employment Servs.*, 41 F.3d 991, 997 (5th Cir. 1995), their heightened pleading requirement is functionally indistinguishable from requiring specificity only in response to a properly raised immunity defense. The better practice, however, is not to require specificity in advance of an assertion of qualified immunity.

[29] In certain cases, some discovery may be needed before a qualified-immunity determination can be made. If a plaintiff specifically alleges conduct that a reasonable officer would not have believed lawful under the state of the law at that time, but defendant's evidence reveals different conduct (consistent with

that the requirement arises only in response to an assertion of a qualified-immunity defense responds to the problem that Judge Patrick Higginbotham anticipated when, in light of the limited scope of Rule 9(b), he questioned whether the Fifth Circuit's "heightened pleading" requirement was authorized even as applied in a qualified-immunity case. *Elliott* v. *Perez*, 751 F.2d 1472, 1483 (1985) (Higginbotham, J., concurring specially).

Because the heightened-specificity standard does not require a defendant to present any evidence in support of a prediscovery qualified-immunity motion, however, it is also not an articulation of the burden of proof. The efficiency sought by the heightened-specificity requirement depends on the court's ability to make the qualified-immunity determination *without* reliance on evidence from the defendant. When the defendant points to evidence in presenting an immunity defense, the plaintiff may claim an entitlement to discovery before the motion is adjudicated (see Fed. R. Civ. P. 56(f); note 25, *supra*)—threatening to impose the very burdens the "heightened pleading" rule seeks to avoid. Ensuring defendants and courts an opportunity to seek additional specificity of allegations from the *plaintiff before* any evidence is proffered helps to ensure that an early, detailed qualified-immunity inquiry is made on a motion to dismiss before any discovery commences.

The timing and function of the specificity requirement in qualified-immunity cases is closely akin to that of the

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clearly established law), "discovery may be necessary" to allow the plaintiff an opportunity to challenge the defendant's evidence before a motion for summary judgment on qualified-immunity grounds can be resolved. *Anderson* v. *Creighton*, 483 U.S. at 646 n.6; see also *Branch I*, 937 F.2d at 1387 (relying on *Anderson* to hold that, once a plaintiff has "met th[e] threshold requirement" of setting forth his claim with specificity, but the defendants maintain their immunity defense, "the district court may, if it believes discovery is warranted, allow the plaintiff to engage in narrowly tailored discovery, supervising the discovery process to avoid imposing unnecessary burdens on the defendants").

Motion for a More Definite Statement provided for by Federal Rule of Civil Procedure 12(e).[30] Cf. *Elliott* v. *Perez*, 751 F.2d at 1482 (referring to availability of sua sponte Rule 12(e) motions for a more definite statement to assist in controlling cases involving potential qualified-immunity defenses). Under the heightened-specificity rule, a plaintiff met with a defendant's assertion of qualified immunity must, if plaintiff's claims have not already been pleaded with adequate specificity, make allegations sufficiently definite to permit determination of whether a violation of a clearly established right has been alleged. The fact that a similar procedure may be achieved through Rule 12(e) highlights the consistency of the heightened-specificity requirement with the Federal Rules of Civil Procedure.[31]

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[30] Rule 12(e) states, in relevant part:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired.

[31] The heightened specificity standard augments the operation of several provisions of the Federal Rules of Civil Procedure addressing pleading and discovery, which have been strengthened in recent years in response to the need to deter groundless or frivolous litigation without unnecessarily chilling meritorious claims. See, *e.g.*, Fed. R. Civ. P. 11(b) (requiring proper purpose and evidentiary and legal grounds for filing), 11(c) (authorizing sanctions for noncompliance), 16 (calling for pretrial conference to expedite disposition of action, facilitate judicial management, and discourage wasteful practices), 26(b)(2) (discovery limitations), 26(c) (protective orders), 26(d) (timing and sequence of discovery), 26(g) (signing of discovery requests), and 37 (sanctions); see also *Elliott* v. *Perez*, 751 F.2d at 1480-1482 (stressing importance of Rules 11 and 16 in qualified-immunity cases); see generally Fed. R. Civ. P. 11, 16, 26, advisory committee's notes. In addition, summary-judgment procedures and standards have been clarified in this Court's decisions in *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986), *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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(1986), and *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986).

Those post-*Harlow* developments help prevent factually unsupported claims from going to trial, and thus serve the purposes of qualified immunity. See *Wyatt*, 112 S. Ct. at 1835 (Kennedy, J., joined by Scalia, J., concurring); see also *Tompkins*, 26 F.3d at 608. They give added bite to this Court's expectation that "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Harlow*, 457 U.S. at 808 (quoting *Butz* v. *Economou*, 438 U.S. 478, 508 (1978)).

Moreover, the position we advocate in our brief *amicus curiae* in *Johnson* v. *Jones*, No. 94-455, if adopted, would alleviate some of the burden that baseless motive-based claims may impose on public officials. In *Jones*, we argue that there is no meaningful distinction between denial of a summary-judgment motion based on an erroneous determination that plaintiff's evidence suffices to support the claim alleged and such a denial based on an erroneous determination that governing law was clear. In either circumstance, the district court's error deprives a public official of the entitlement, protected by qualified immunity, not to stand trial on an insubstantial claim. In either circumstance, we argue, interlocutory appeal is equally appropriate. Such an opportunity to appeal before trial would provide an added layer of protection against erroneous denials of qualified-immunity defenses.

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